

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

CYNTHIA D. PAJAK

Plaintiff,

v.

CIVIL ACTION NO.: 1:19-cv-160
JUDGE: KLEEH

UNDER ARMOUR, INC.,
UNDER ARMOUR RETAIL, INC.,
AND BRIAN BOUCHER

Defendants.

DEFENDANT BRIAN BOUCHER'S MOTION FOR SUMMARY JUDGMENT

COMES NOW the Defendant, Brian Boucher, by counsel, Scott H. Kaminski, Franki L. Parsons and Ray, Winton & Kelley, PLLC, pursuant to Rule 56 of the Federal Rules of Civil Procedure and moves this Court for an Order granting summary judgment in his favor as to all issues and claims as Plaintiff has failed to raise genuine issues of material fact that would prevent this Court from ruling as a matter of law.

Boucher adopts and joins in the Motion for Summary Judgment filed by Under Armour, Inc. and Under Armour Retail, Inc. as well as the Memorandum of Law in Support Thereof and Statement of Facts contained therein. In the interests of brevity and judicial economy, Boucher submits the contemporaneously filed Memorandum of Law in Support of his Motion for Summary Judgment with respect to those issues

pertinent to him, being 1) the applicability of the West Virginia Human Rights Act, W.Va. Code §5-11-1 et seq. ("WVHRA") to Plaintiff's claims against him as a "person" where the WVHRA is not applicable to their employer and 2) Plaintiff's claim of Intentional Spoliation of Evidence against Defendant Boucher.

Boucher joins co-Defendants Under Armour, Inc. and Under Armour Retail, Inc. (collectively referred to as "UA") as to all issues save one. Defendants' path on this issue diverges only because the Supreme Court of Appeals of West Virginia decided on April 22, 2022 that Plaintiff's claims against UA under the WVHRA fail to meet the numerosity requirement of the WVHRA, employing fewer than twelve employees within the state of West Virginia. Relative to the applicability of the WVHRA to Boucher, the Supreme Court of Appeals of West Virginia declined to opine. The applicability of the WVHRA to Boucher is ripe for summary judgment at this time.

In addition, Boucher expands upon UA's argument relative to Plaintiff's Intentional Spoliation of Evidence claim as it pertains to Boucher. Plaintiff has failed to prove that Boucher failed to preserve evidence related to her claims or that he intentionally deleted information not otherwise available and relevant to her claims. See Ex. 1, Boucher Depo.

Accordingly, for the reasons set forth herein as well as in Under Armour, Inc. and Under Armour Retail, Inc.'s Motino

for Summary Judgment and Memorandum of Law in support thereof, and in Boucher's Memorandum of Law in Support to his Motion for Summary Judgment filed contemporaneously herewith, Brian Boucher respectfully requests that this Court grant summary judgment in his favor.

BRIAN BOUCHER

By Counsel

s/Scott H. Kaminski
Scott H. Kaminski (WVSB#6338)
Ray, Winton & Kelley, PLLC
109 Capitol Street, Suite 700
Charleston, WV 25301
304-342-1141
ScottKaminski@rwk-law.com

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UNDER ARMOUR, INC.,
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Defendants.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on 1st day of August, 2022, he served a true and correct copy of the foregoing DEFENDANT BRIAN BOUCHER'S MOTION FOR SUMMARY JUDGMENT via CM/ECF which will send electronic notice to the following counsel of record:

Robert M. Steptoe, Jr.
Larry J. Rector
Amy M. Smith
Allison B. Williams
Dylan T. Hughes
Steptoe & Johnson PLLC
400 White Oaks Boulevard
Bridgeport, West Virginia 26330
Counsel for Plaintiff

Justin M. Harrison
Jill E. Hall
Grace E. Hurney
Laura Ann Hoffman
Jackson Kelly PLLC
500 Lee Street, East, Suite 1600
Post Office Box 553
Charleston, West Virginia 25322
**Counsel for Under Armour, Inc. and Under
Armour Retail, Inc.**

Amy Estelle Askew
Kramon & Graham, PA
1 South St., Suite 2600
Baltimore, Maryland 21202
**Counsel for Under Armour, Inc. and Under
Armour Retail, Inc.**

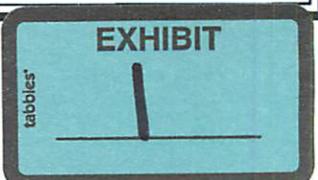
s/Scott H. Kaminski
Scott H. Kaminski (WVSB#6338)

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<p>1 lawyers told the Court that you had deleted 7,000 text 2 messages from your iPhone. Do you have any idea when 3 you deleted those text messages, Mr. Boucher?</p> <p>4 A. I mean, I deleted text messages my entire time 5 at Under Armour. To think that I know the totality of 6 what those are, it's -- I don't. I mean, it's -- you 7 know, I received, sent, and deleted text messages for 8 the entire three years that I was there. So I have no 9 idea what that reference point or what time frame or 10 anything that was a reference about that.</p> <p>11 Q. Okay. We showed you information before which 12 indicated that you received Under Armour's litigation 13 hold on February 26. Do you think you deleted 7,000 14 text messages between February 26 and March 15 of 2019?</p> <p>15 A. No.</p> <p>16 Q. When I first took your deposition on November 17 20, you provided some inconsistent testimony and I just 18 want to give you an opportunity to revisit that today to 19 make sure we're on the same page about this. You made 20 reference to Under Armour wiping data from your phone, 21 so my question to you, Mr. Boucher, is: Do you have any 22 reason to believe that on March 15 anyone at Under 23 Armour did anything to modify data on your iPhone?</p> <p>24 A. Absolutely not.</p>	<p>1 Q. So if I understand you correctly, Mr. Boucher, 2 it's your testimony that a week or so after your 3 employment ended at Under Armour you had an email 4 exchange with Ms. Cordisco about returning your phone to 5 Under Armour?</p> <p>6 A. Correct.</p> <p>7 Q. Why would Ms. Cordisco or Under Armour want 8 your phone back?</p> <p>9 A. It was their phone. They purchased the phone 10 for me. They just -- you know, they allowed me to port 11 the number but not keep the phone so -- and I was 12 getting a new phone anyway.</p> <p>13 Q. You have a specific and clear recollection of 14 having that email exchange with Jeanne?</p> <p>15 A. I do.</p> <p>16 Q. Do you still have that email?</p> <p>17 A. I do not.</p> <p>18 Q. That would have been sent from your personal 19 email address?</p> <p>20 A. It would have, yes.</p> <p>21 Q. You said you returned to I think the reference 22 you used was station house?</p> <p>23 A. Yeah, the check-in desk at the main campus 24 where all visitors go.</p>
<p>1 Q. During the course of this lawsuit, your 2 counsel has made some representations to the Court about 3 what you physically did with the phone after March 15; 4 and it's my understanding based upon information that 5 counsel has shared that at some point in time you 6 actually returned the iPhone to Under Armour.</p> <p>7 A. That's correct.</p> <p>8 Q. I'd like to know a little bit more about that. 9 How did that come about?</p> <p>10 A. You had referenced the last day of employment 11 that I had met with Jeanne Desisko (sic) to -- as part 12 of my exit interview of where I turned in all of my, you 13 know, credit card and equipment as you had mentioned. 14 And during that meeting, I had asked to keep my phone 15 for a period of a couple of weeks until I received a new 16 phone. And so there was a document that I had to sign 17 and she, you know, granted me the ability to keep the 18 phone to be able to use for phone calls and whatnot.</p> <p>19 And so she had sent me emails probably 20 about a week or two after that checking in on had I 21 received my new phone, and I had responded that I 22 had and I was dropping off -- going to return the phone 23 to Under Armour which to their station house on the main 24 campus to the security desk to her attention.</p>	<p>1 Q. Who did you return the phone to?</p> <p>2 A. There's a security person there.</p> <p>3 Q. Do you remember the name of the individual you 4 handed the phone to?</p> <p>5 A. I don't.</p> <p>6 Q. Was the phone in a box or a wrapper or any 7 type of packaging?</p> <p>8 A. No, I think I just turned in the phone and 9 put, you know, whether it be a Post-it or some note that 10 said to the attention of Jeanne Desisko and notified 11 that individual that that's who it was for.</p> <p>12 MR. RECTOR: Mr. Harrison, I'm not going 13 to interrupt you now, but whenever it's a good time to 14 take a break, we've been going about an hour.</p> <p>15 MR. HARRISON: Yeah, give me a second. 16 Thank you.</p> <p>17 MR. RECTOR: Sure.</p> <p>18 Q. Mr. Boucher, do you have any documentation or 19 notes that relate to your return of the phone to Jeanne?</p> <p>20 A. Any documentation or notes, no. I mean -- no.</p> <p>21 Q. Aside from Jeanne, did you tell anyone else at 22 Under Armour that you would be returning the phone?</p> <p>23 A. No. There would be nobody else to tell. My 24 exit interview was with her and she's the one that</p>

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<p>1 secure the iPhone. She then testified that she then 2 called you and asked you to turn around. I think she -- 3 this part I will confess I'm not 100 percent 4 recollection on. I think she said that you were already 5 in your car departing the complex, and she asked you to 6 turn around to return the iPhone and she -- her words 7 were quite clearly you -- frankly your attorney asked 8 her to characterize it was hesitant and she did not do 9 that. She said you were resistant.</p> <p>10 A. She did not ask me to return -- again, to be 11 clear, when she did -- and she could be correct that she 12 called me. I was just departing the building. I 13 thought she chased me down in person. If she called 14 when I was in my car, I had asked her what it was -- she 15 said, hey, Melissa Miller was trying to get in touch 16 with me while I was doing the exit interview with you. 17 She wants you to get in touch with the legal team. And 18 I said, What is this regarding? Do you know what this 19 is about? She said, No, I do not. She never mentioned 20 anything about the iPhone. Never mentioned anything 21 about anything other than I needed to call them.</p> <p>22 So there was never any conversation 23 between her and I about me turning around or turning in 24 the iPhone or doing anything. It was only that I needed</p>	<p>1 Q. -- and you deleted data knowing that the 2 laptop was one of the devices subject to the litigation 3 hold issued on February 26, 2019 --</p> <p>4 A. Yes.</p> <p>5 Q. Why would you delete data off the laptop 6 knowing that was subject to a preservation obligation?</p> <p>7 A. Because all of the information with regard to 8 Ms. Pajak I had turned over to Mr. Toner in December and 9 confirmed that I had turned over every piece of 10 correspondence that I had with regard to Ms. Pajak. 11 When I received the litigation hold on the 26th of 12 February, I, once again, went to Mr. Toner and confirmed 13 that, hey, I received this litigation hold. Just want 14 to confirm with you that I turned in everything with 15 regard to Ms. Pajak to you. He concurred.</p> <p>16 And so any other thing that I would have 17 deleted or got rid of did not have anything to do with 18 Ms. Pajak. It was regarding other Under Armour business 19 that -- or projects or information that didn't have 20 anything to do with Ms. Pajak.</p> <p>21 Q. You deleted the Kristen Gladkowski text from 22 your phone, didn't you?</p> <p>23 A. I deleted those as they were happening.</p> <p>24 Q. Did you -- you received -- sent and received</p>
<p>1 to get -- the legal team needed to speak with me before 2 I left the campus.</p> <p>3 Q. Okay. You seem, again, certain in your 4 testimony in that regard. Is that fair?</p> <p>5 A. Yes.</p> <p>6 Q. And, frankly, I know you haven't had the 7 benefit of seeing her testimony or reading her 8 transcript, but she was equally certain in her 9 testimony. If that's the case, then what do you make of 10 that?</p> <p>11 A. I don't know why she would testify to 12 something that didn't transpire. And, further, there 13 would be no reason why I wouldn't have -- if they wanted 14 to take my phone for whatever reason, I would have 15 turned it in. I went over and turned it into the legal 16 department. If she had requested, I would have turned 17 it in to her. There's no hesitation. There would have 18 been no reason other than I needed phone service. I 19 didn't have another phone set up. That was the only 20 reason that I needed to retain the phone and there would 21 have been no time I hesitated whatsoever to do that.</p> <p>22 Q. Now, before you turned in your laptop, you 23 deleted data off the laptop, didn't you?</p> <p>24 A. Sure. Yes.</p>	<p>1 pictures from Ms. Gladkowski; is that right?</p> <p>2 A. Well, when you say sent, I don't recall 3 sending her pictures. I recall receiving pictures from 4 Ms. Gladkowski.</p> <p>5 Q. Did you preserve any of those pictures that 6 you received?</p> <p>7 A. I did not.</p> <p>8 Q. I think your lawyer has through some 9 questioning suggested that Ms. Gladkowski sent you 10 pictures of her in a bikini; is that right?</p> <p>11 A. She was on vacation with girlfriends of hers 12 in South Carolina, and had sent me a picture of her on 13 vacation with -- on a beach.</p> <p>14 Q. Other picture? Did she send you other 15 pictures?</p> <p>16 A. Yeah, of floor sets or new product or some 17 other things that she shared that I recall that she sent 18 me pictures of.</p> <p>19 Q. And you deleted all of those pictures that she 20 had sent you over the course of the exchanges with her?</p> <p>21 A. I did.</p> <p>22 Q. Is it your testimony that you didn't delete 23 any of those in March of 2019?</p> <p>24 A. I didn't delete any of those in March of 2019.</p>

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<p>1 A. Correct.</p> <p>2 Q. Now, you surrendered your laptop and your iPad</p> <p>3 to Ms. Cordisco on the 15th; correct?</p> <p>4 A. Correct.</p> <p>5 Q. Sorry. I couldn't hear you.</p> <p>6 A. Correct.</p> <p>7 Q. Are you aware that Under Armour has never been</p> <p>8 able to produce anything on that iPad or the iPad itself</p> <p>9 in this case?</p> <p>10 A. I never set up the iPad with my Under Armour</p> <p>11 email or anything. I never used the iPad, so I would</p> <p>12 assume that there's -- I never set it up with anything,</p> <p>13 that I never used it, so I'm not surprised that there is</p> <p>14 none. I never set it up for use at work. I had it, it</p> <p>15 was issued to me, but I never utilized it while there.</p> <p>16 Q. I understand your testimony that you never</p> <p>17 utilized it. My question a is a little bit different.</p> <p>18 You had surrendered that iPad to Under Armour; correct?</p> <p>19 A. Yes.</p> <p>20 Q. Under Armour then logged it into evidence</p> <p>21 under a chain of custody form, and I'm going to show you</p> <p>22 that form. We're -- that is Under Armour 7371 and just</p> <p>23 let me know when you've had a chance to review it,</p> <p>24 Mr. Boucher.</p>	<p>1 counsel. If you can answer that question, Brian, based</p> <p>2 on information you learned from someone other than</p> <p>3 myself, you may answer if you --</p> <p>4 A. Yeah. Mr. Rector, I just want to be clear.</p> <p>5 Are you asking me if I am aware that they logged the</p> <p>6 iPad into evidence but they have not been able to</p> <p>7 produce the iPad after logging it into evidence?</p> <p>8 Q. Yes, sir.</p> <p>9 A. I'm not aware of that.</p> <p>10 Q. Okay. This other piece of evidence in this</p> <p>11 case, the first item which is UA I believe that's PC.</p> <p>12 You see that?</p> <p>13 A. Yes.</p> <p>14 Q. I'll represent that corresponds to the laptop</p> <p>15 they did produce in case. You're aware, aren't you,</p> <p>16 sir, that Under Armour had one of its contractors look</p> <p>17 at your laptop to see what was on it?</p> <p>18 MR. KAMINSKI: Again, let me interpose</p> <p>19 an objection to the extent that I'm not sure the witness</p> <p>20 can answer without divulging information he's learned</p> <p>21 from his counsel. Mr. Boucher, you can answer the</p> <p>22 question to the extent that you had knowledge responsive</p> <p>23 to Mr. Rector's question that you did not learn from me.</p> <p>24 A. I was not aware.</p>
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<p>1 A. (Reviews document.) Okay.</p> <p>2 Q. I had used the term that Under Armour had</p> <p>3 logged it into evidence; right?</p> <p>4 A. Yes.</p> <p>5 Q. That's a fair characterization of what this</p> <p>6 represents, isn't it?</p> <p>7 MR. HARRISON: Objection. Calls for</p> <p>8 speculation.</p> <p>9 MR. KAMINSKI: Object to the form. You</p> <p>10 can answer if you know.</p> <p>11 A. I've never seen this form, but it -- the title</p> <p>12 says, Description of evidence, so it's -- I agree with</p> <p>13 your assessment of it, yes.</p> <p>14 Q. Okay. This form under description of evidence</p> <p>15 lists one iPad; correct?</p> <p>16 A. Correct.</p> <p>17 Q. So you surrendered the iPad. That much we</p> <p>18 know. They actually logged it into evidence. Are you</p> <p>19 aware that they have never been able in this case to</p> <p>20 actually physically produce this piece of evidence that</p> <p>21 they logged into their own evidence room?</p> <p>22 MR. KAMINSKI: Let me object to form of</p> <p>23 the question. I'm not sure the witness can answer</p> <p>24 without divulging information he's learned from his</p>	<p>1 Q. Okay. I think there was discussion of the</p> <p>2 laptop during the March 4 hearing with Judge Keeley that</p> <p>3 you participated in. Do you not recall that?</p> <p>4 A. I recall the hearing. If you can remind me of</p> <p>5 the -- I don't recall something specific to my laptop,</p> <p>6 but she or somebody could have referenced it.</p> <p>7 Q. Okay. There's a contractor of Under Armour</p> <p>8 named Steven Kitchen, an IT contractor. He's been</p> <p>9 deposed in this case and he testified that there were</p> <p>10 vast amounts of data that were deleted from your laptop</p> <p>11 before it was surrendered. Would you agree with that</p> <p>12 characterization if that's his testimony?</p> <p>13 A. Yes. I mean, in my last week of employment</p> <p>14 there and, you know, cleaning up files and transitioning</p> <p>15 work to other people to the organization and giving --</p> <p>16 as I mentioned earlier that, yeah, I did clean and</p> <p>17 delete and transfer and sent information to people that</p> <p>18 would have been relevant to. So, sure, I would have</p> <p>19 cleaned up and organized and deleted stuff at that time</p> <p>20 during that last week.</p> <p>21 Q. There's been testimony in the case that we're</p> <p>22 talking about significant amounts of data, entire</p> <p>23 folders, emails, documents that were deleted. Would you</p> <p>24 agree that that's what you did that last week?</p>

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<p>1 A. Yes. As I had mentioned earlier, the way that 2 I organized was I used Outlook folder, so as trans -- if 3 the information was no longer relevant to, you know, 4 work that I had done or I had forwarded it to other 5 people that were going to be taking over that work, I 6 would have deleted both the content within those folders 7 and probably the folders themselves.</p> <p>8 Q. You knew that that laptop was under a 9 preservation obligation at the time that you were doing 10 that, didn't you?</p> <p>11 A. I had received as we talked about before the 12 litigation hold and confirmed that every information 13 with regard to that hold that I had forwarded to the HR 14 department and Mr. Toner. So, yes, I was aware of the 15 litigation hold, but nothing that I was working on, 16 deleting or transferring or sending had anything to do 17 with that litigation hold.</p> <p>18 Q. I understand that's your testimony, but my 19 point is you knew that that device was under a specific 20 preservation obligation and yet with that knowledge you 21 deleted content from that device; isn't that true?</p> <p>22 MR. KAMINSKI: I'm going to object to 23 the form of the question to the extent that calls for a 24 legal conclusion. You may answer.</p>	<p>1 Q. The litigation hold specifically says if you 2 want guidance with regard to your requirements under 3 that litigation hold, you had somebody you could 4 contact; isn't that right?</p> <p>5 A. Yes, which, as I stated, I had done when I 6 received the litigation hold.</p> <p>7 Q. But you never did it that last week of your 8 employment as you were deleting materials from that 9 laptop; isn't that true?</p> <p>10 A. Again, you continue to ask the questions to 11 get to a different answer. If I've confirmed that 12 everything that I had with regard to Ms. Pajak was 13 already turned in to the organization, then there would 14 be no need for me to reaffirm that information that I 15 had that did not have anything to do with Ms. Pajak 16 couldn't be sent, transferred, forwarded, or deleted 17 from the laptop.</p> <p>18 Q. Now, you say that you forwarded information to 19 Mr. Toner that you thought was everything you had 20 related to Ms. Pajak; is that correct?</p> <p>21 A. Yes.</p> <p>22 Q. How did you do that? By email?</p> <p>23 A. By email.</p> <p>24 Q. So there's an email from you and I think you</p>
<p>1 A. I knew that I was responsible for maintaining 2 or for preserving any information, correspondence, 3 documentation, et cetera, with regard to Ms. Pajak which 4 I had stated that I had done and forwarded on to 5 Mr. Toner. So there was nothing that I was working on, 6 sending, deleting or getting rid of that had anything to 7 do with my understanding of the litigation hold with 8 regard to preserving information and evidence for -- 9 regarding Ms. Pajak.</p> <p>10 Q. Prior to deleting all that data from your 11 laptop, did you ever reach out to anybody at Under 12 Armour to ask guidance given that you were aware of a 13 litigation hold?</p> <p>14 A. No.</p> <p>15 Q. So you deleted stuff off the laptop your last 16 week of employment that was under a litigation hold 17 without then seeking guidance from anybody at Under 18 Armour legal with regard to what you should or should 19 not do; isn't that true?</p> <p>20 A. I did not seek guidance from anybody with the 21 exception of as I had stated when I received the 22 litigation hold confirming with Mr. Toner that I had 23 sent him and the organization everything with regard to 24 Ms. Pajak. No.</p>	<p>1 testified earlier that it was after she was terminated 2 on December 10, 2018; correct?</p> <p>3 A. Well, to be clear, every correspondence that I 4 had with Ms. Pajak from the June time frame on, I 5 conferred with Mr. Toner and he with the legal team 6 because she had made us aware that she was seeking 7 outside advice from an attorney. And so all 8 correspondence from that June time frame forward was 9 forwarded to, copied to, or in the possession of 10 Mr. Toner.</p> <p>11 My confirmation with Mr. Toner upon Cyndi 12 being separated from the company was that I had 13 forwarded him everything and that he had everything, of 14 which he concurred. I, once again, when I received the 15 litigation hold on the 26th of February confirmed, once 16 again, with him that he had everything that I had with 17 regard to Ms. Pajak, and he concurred.</p> <p>18 Q. How would he know -- how would he possibly 19 know that he had everything that you did?</p> <p>20 A. Because I shared everything with him from June 21 forward whether it had been, you know, copies of text 22 messages or any, you know, correspondence she might have 23 sent to me otherwise or me to her. So he had everything 24 throughout the entire process.</p>